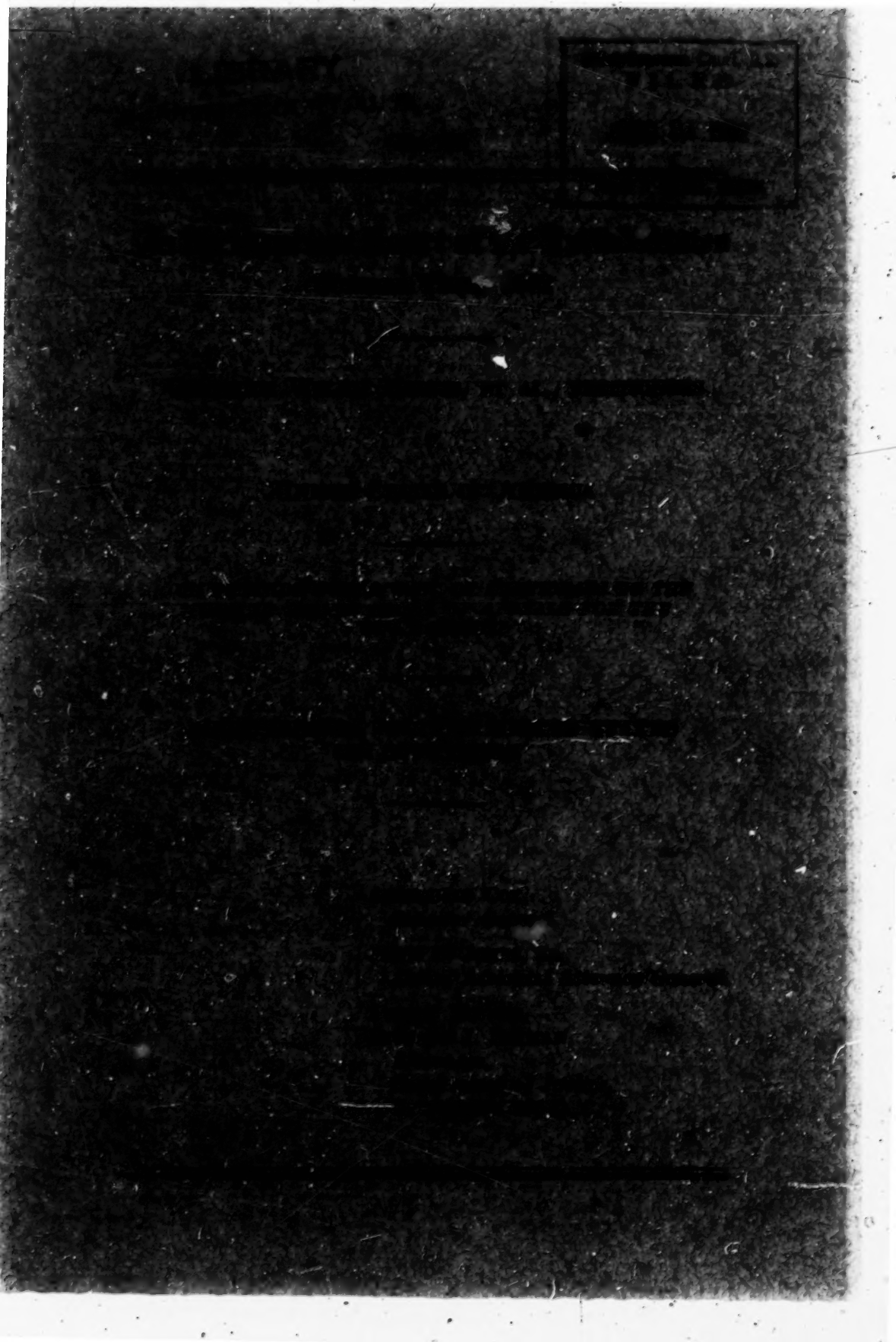

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 295

GERTRUDE WELCH MORRIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petitioners claim an interest as beneficiaries, in the proceeds of certain insurance policies being held by the Massachusetts Mutual Life Insurance Company. Asserting that the Director for the District of Detroit, Michigan, had filed a notice of levy upon the insurance company with respect to the proceeds of these policies, petitioners brought the three instant actions in the District Court for the District of Massachusetts for a determination of the

extent of the government's tax lien. The district court ordered a dismissal of the suits (R. 24a),[1] and the court of appeals affirmed (Pet. 14-16).

The insurance company, which is holding the proceeds in question and upon which the government's levy was served, was not made a party to the action. However, the primary dispute alleged in the complaints is between the United States and the insurance company. Thus, in two of the actions, Nos. 5937 and 5938, the petitioners do not themselves dispute the validity and priority of the government's lien, but allege that the insurance company has a lien on the proceeds superior to that of the government. The complaints suggest that the company's lien eliminates the government's tax lien (R. 13a, 18a). In the remaining suit, No. 5936, where petitioners themselves question the validity and priority of the lien, they also allege that a premium loan was made to the assured on the policy to the extent of substantially the entire cash value. Again the suggestion is that the loan wipes out the tax lien (R. 8a, 9a). As the court of appeals said (Pet. 15):

> Their [petitioners'] legal claim is against the insurance company, but they have not sued it. Their asserted reason is that "no dispute" exists between them. However, in the company's absence how is this to be determined?

The insurance company is an indispensable party to each of these proceedings. Without it, no court

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[1] Record references are to the appendix to the petitioners' consolidated brief in the court of appeals.

can render a meaningful judgment. The relief requested by petitioners is with regard to tax enforcement against the insurance company, and it is the company which would be directly affected by any judgment determining the extent of the government's interest. This relief could not be granted because the suits were defective for lack of an indispensable party. Therefore, dismissals were necessary even if the district court otherwise had jurisdiction. *Keegan* v. *Humble Oil & Refining Co.*, 155 F. 2d 971 (C.A. 5th); *Emery* v. *Adams*, 179 F. 2d 586 (C.A. 6th); *Mallin* v. *Schaper*, 185 F. 2d 1 (C.A. 7th).[2]

Petitioners' claim that it was error for the district court to dismiss the suits on the ground that 28 U.S.C. 2463 does not confer jurisdiction presents no issue for review here. Even assuming *arguendo* that Section 2463 were held to confer jurisdiction as petitioners claim, the dismissals were properly affirmed by the court of appeals for the lack of the indispensable party. Petitioners make no claim that Section 2463 remedies this flaw. *Cf. New Hampshire Fire Ins. Co.* v. *Scanlon*, 362 U.S. 404. Under the circumstances the instant cases afford no occasion for resolution of any conflicts in the interpretation of Section 2463 which may be found in the decisions of the Third Circuit in *Rothensies* v. *Ullman*, 110 F. 2d

[2] This defect was not urged in the district court, but was raised in the court of appeals. Lack of an indispensable party may be noted for the first time on appeal. *Hoe* v. *Wilson*, 76 U.S. 501; *McShan* v. *Sherrill*, 283 F. 2d 462 (C.A. 9th); *Haby* v. *Stanolind Oil and Gas Co.*, 225 F. 2d 723 (C.A. 5th); *Flynn* v. *Brooks*, 105 F. 2d 766 (C.A. D.C.); Federal Rules of Civil Procedure, Rule 12(b).

590, and *Raffaele* v. *Granger*, 196 F. 2d 620,[3] and the Ninth Circuit in *Seattle Assn. of Credit Men* v. *United States*, 240 F. 2d 906.

Finally, it should be noted that on May 31, 1962, the government instituted a civil action in the District Court for the Eastern District of Michigan[4] to foreclose the tax liens on, among other things, the cash surrender values of the insurance policies here in question. Thus, the petitioners will obtain in that action the relief—the determination of the extent of the government's lien—which they were seeking here.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 1962.

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[3] These cases involved summary actions to quash warrants of distraint issued by revenue officials on bank accounts and were expressly overruled by this Court in *New Hampshire Fire Ins. Co.* v. *Scanlon*, *supra*, on the ground that Section 2463 does not authorize summary proceedings.

[4] Civil Action No. 22626.

U. S. GOVERNMENT PRINTING OFFICE 1962 656027